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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958
No. 453

WALTER M. BRIGGS, doing business as WALT'S AUTO PARKS AND GARAGES,

Appellant,

vs.

THE CITY OF LOS ANGELES; THE BOARD OF POLICE COMMISSIONERS OF THE CITY OF LOS ANGELES, STATE OF CALIFORNIA; MICHAEL KOHN, EMMETT McGAUGHEY, JOHN FERRARO, WILLIAM C. LUCITT and HERBERT A. GREENWOOD, Members of and constituting the Board of Police Commissioners of the City of Los Angeles,

Appellee.

WALTER M. BRIGGS, doing business as WALT'S AUTO PARKS AND GARAGES,

Appellant,

vs.

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Appellee.

MOTION TO AFFIRM THE JUDGMENT AND/OR DISMISS THIS APPEAL.

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Appellee.

MOTION TO AFFIRM THE JUDGMENT AND/OR DISMISS THIS APPEAL.

Appellee, pursuant to the Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the judgment of the District Court of Appeal, Second Appellate District, Division One, State of California, rendered and entered on June 10, 1958, be affirmed and/or that the appeal taken therefrom to this court be dismissed on the ground that the Federal question is so unsubstantial as not to warrant further argument.

Statement.

This is an appeal from the judgment of the District Court of Appeal, Second Appellate District, Division One, State of California.

Appellant was charged in a complaint filed with the Board of Police Commissioners of the City of Los Angeles on April 5, 1955, with violating Section 26.03 of the Los Angeles Municipal Code.

A hearing was held before a hearing examiner of appellee Board on June 3, 1955, at which time said examiner took testimony and received evidence of both parties in connection with appellant's application for renewal of his public automobile parking lot permit.

The hearing examiner filed his report and recommendations with the Board. The Board thereafter considered the hearing examiner's report and petitioner's exceptions and held further hearings on June 29, 1955, August 3, 1955, and August 8, 1955.

Section 26.03 of the Los Angeles Municipal Code provides, among other things, that the Board may suspend or revoke a permit, after due notice and opportunity for a hearing, if the permittee has violated any of the provisions of Section 26.03.

The Board denied petitioner's exceptions, adopted the hearing examiner's report and recommendations and, on August 3, 1955, suspended petitioner's police permit for his public parking lot at 630 South Hill Street, Los Angeles, California, for the period commencing August 14, 1955, and ending at the close of business on August 20, 1955.

On August 8, 1955, the Board denied appellant's petition for reconsideration.

A. Petition for Review of the Decision of the Police Commission Was Filed in the Superior Court.

The proceeding was heard on November 28, 1955, and of December 19, 1955, in Department 34 of the Superior Court, and, following argument by respective counsel, was submitted on the record, which the court considered. The record showed by substantial evidence that the provisions of Section 26.03 of the Los Angeles Municipal Code were violated by petitioner on numerous occasions.

The record before the trial court included the Petition for Writ of Review and Writ of Prohibition, together with a copy of the complaint before the hearing examiner, a copy of Section 26.03 of the Los Angeles Municipal Code, Ordinance No. 89,677, as amended by Ordinance No. 102,926, a copy of the hearing examiner's report, a copy of the petitioner's exceptions to the hearing examiner's report, and a copy of the letter of notice to the petitioner of the Board's order of suspension, and the Answer to the Petition, together with the reporter's transcript of the proceedings before the Board, and the documentary evidence received by the examiner and considered by the Board.

The trial court only heard argument and denied the petition for review on May 17, 1956. Thereafter an appeal was taken from the decision of the Superior Court wherein Section 26.03(k) was attacked as unconstitutional, as beyond the police power of the city; as an unreasonable classification; also that the ordinance unreasonably regulates the operation of such parking lots and impairs the right to contract, and subdivision (k) denies the operator the right to drive on the highways.

The District Court of Appeal, Second Appellate District, Division One, thereafter upheld the constitutionality

of Section 26.03 of the Municipal Ordinance and particularly Section 26.03(k), and as constitutional and not in violation of the (state or) Federal Constitution (154 Cal. App. 2d 642), and denied the challenge to the ordinance as being arbitrary, capricious, denying equal protection of the laws, and impairing the obligation of contract.

A petition for hearing in the Supreme Court of the State of California was denied. Thereafter a petition for a Writ of Prohibition and a Writ of Mandate, attacking the constitutionality of Section 26.03(k) on the ground that it violates Article I, Section 10 of the United States Constitution and the Fourteenth Amendment to the Constitution of the United States, was duly filed and denied by the District Court of Appeal on June 10, 1958. Petitioner specifically challenged the constitutionality of Section 26.03(k) of the Municipal Code of the City of Los Angeles, inherently and as construed and applied in this case as violative of the Fourteenth Amendment to the Constitution of the United States, and Article I, Section 10, of the Constitution of the United States, and challenged the ordinance as abridging the freedom of contract.

Incorporated also was the action before the same court in denying the contention of petitioner that the action of the Board of Police Commissioners was arbitrary and capricious and denied equal protection of the laws. The Supreme Court denied a hearing on August 6, 1958.

Presiding Justice, Thomas P. White, ordered the records of the cases in 2d Civil No. 21874, *Briggs v. City of Los Angeles,* and No. 23204, *Briggs v. City of Los Angeles,* consolidated for the purposes of appeal.

Argument.

In this case no challenge was made to the Board's jurisdiction prior to its order of suspension. The issue was not raised at any time in the administrative proceeding. Appellant, however, brought a proceeding to test the constitutionality of the ordinance by way of application for writ of review and writ of prohibition. It may be deemed that the purpose was to attack the Board's decision as an act without or in excess of jurisdiction.

In *United States v. Sing Tuck,* 194 U. S. 161, 24 S. Ct. 621, 48 L. Ed. 917, where the question of administrative jurisdiction to act was first raised in a judicial proceeding for writ of habeas corpus, the Supreme Court reversed the Circuit Court of Appeal, stating that ". . . it is one of the necessities of the administration of justice that even fundamental questions should be determined in an orderly way." The substance of the court's holding was that the administrative tribunal first be given the opportunity of deciding its jurisdiction.

As the cases hold, this is a part of the doctrine of the exhaustion of administrative remedies, for it is not to be assumed that an administrative tribunal will act contrary to the law. Rather, it is presumed that it will regularly perform its official duty. (Code Civ. Proc., Sec. 1963.)

Where there is an opportunity to have questions determined by the agency, resort should not, in the first instance, be to the courts.

United States v. Sing Tuck, supra.

> ". . . it lies *within the power of the administrative agency* to determine in the first instance, and before judicial relief may be obtained, whether a

given controversy falls within the statutory grant of jurisdiction. (Citing.) And even where the statute sought to be applied and enforced by the administrative agency is challenged upon constitutional grounds, completion of the administrative remedy has been held a prerequisite to equitable relief. (Citing.)" (Emphasis supplied.)

United States v. Superior Court, 19 Cal. 2d 189, 195;

Woodward v. Broadway Fed. S. & L. Assn., 111 Cal. App. 2d 218.

B. Appellant Is Estopped to Assert Unconstitutionality.

Furthermore, it appears that appellant is estopped to assert the unconstitutionality of the ordinance in this proceeding. He applied for a police permit from the Board pursuant to the ordinance under attack. That ordinance provides various regulatory measures governing the conduct of public automobile parking lots. Appellant has had the benefit of a permit under the ordinance and also has had the benefit of a hearing on specified violations of that ordinance. His existence as a public parking lot operator has been under the aegis of the ordinance which he now attacks. If he can hold his permit under the ordinance, but strike down the provisions terminating, suspending, or otherwise regulating his conduct in its operation, then he may perpetually continue its operation notwithstanding any abuses which he may perpetrate. This court should, therefore, hold that appellant is estopped from challenging the provisions of the ordinance authorizing the Board to impose discipline for violating those provisions.

Stating the matter substantially as above, the United States Supreme Court has declared it to be reversible

error to hold a statute unconstitutional where the question was so raised.

Fahey v. Mallonee, 332 U. S. 245, 91 L. Ed. 2030.

C. Appellant Has Other Remedies Precluding His Right to the Writ.

Finally, even if appellant had properly raised the question of jurisdiction before the Board and that matter had been determined adversely to him, he would still have had an adequate remedy at law by an action for declaratory relief to test the constitutionality of the ordinance (15 Cal. Jur. 2d 208), in which case a preliminary injunction could be issued; or by an action to enjoin the ordinance on the ground that it was unconstitutional.

Bueneman v. Santa Barbara, 8 Cal. 2d 405;

French Art Cleaners v. State Board, etc., 91 Cal. App. 2d 890;

Downing v. California State Bd. of Pharmacy, 85 Cal. App. 2d 30.

D. Appellant Had a Fair Hearing and Subsequent Judicial Determination.

As set forth in the statement of facts, appellant had a complete and fair hearing before the hearing examiner and appellee Board. Appellant subsequently, in accordance with Section 1094.5 of the Code of Civil Procedure, made application for a writ of mandate.

E. The Constitutional Question.

Although not properly raised by the appellant in his petition for the writs and in the appeal from their denial, his assertions of unconstitutionality are determined by answering the question of whether or not a municipality

can, by ordinance, so regulate a commercial parking lot as to prohibit the operation of that business upon the public streets.

The City of Los Angeles may make and enforce within its limits such local and police regulations as are not in conflict with the general laws.

Cal. Const., Art. XI, Sec. 11;
Los Angeles City Charter, Sec. 2, Par. (6);
Los Angeles City Charter, Sec. 203.

This police power, within local limits and subject to the general laws, is as broad as that of the Legislature.

In re Maas, 219 Cal. 422;
In re Martinez, 22 Cal. 2d 259;
11 Cal. Jur. 2d 531.

In the latter case, regulation of taxicabs, though operated on public highways and subject to the traffic regulations of the Vehicle Code, was upheld as a reasonable exercise of its police power by the city.

In exercise of the police power, the state may prescribe regulations to promote public health, safety, morals and welfare, and legislate to increase industries, develop resources, and promote welfare and prosperity.

Pughe v. Lyle, 10 Fed. Supp. 245;
Graham v. Kingwell, 218 Cal. 658;
Ex parte Weisberg, 215 Cal. 624;
City of Pasadena v. Charleville, 215 Cal. 384.

Under its police power, the state in a proper case has the power, acting in the interests of the general welfare,

to regulate property and contract rights, and this includes the power to regulate the rights of free bargaining; and the fact that a statute limits the rights of free bargaining in other ways, does not of itself determine the validity of the enactment.

Max Factor & Co. v. Kunsman, 5 Cal. 2d 446.

A property owner's right to unlimited and uncontrolled disposition of property may properly be subordinated to public good under the police power.

Clemons v. City of Los Angeles, 36 Cal. 2d 95.

A municipality can regulate useful businesses which by their nature are affected with a public interest.

Munn v. Illinois (1876), 94 U. S. 113, 24 L. Ed. 77;

State Board v. Thrift-D-Lux Cleaners (1953), 40 Cal. 2d 436, 442-443.

The United States Supreme Court has declared that the term "affected with a public interest" means no more than "subject to the exercise of police power." ". . . there is no closed category of businesses affected with a public interest, . . ." and, "The phrase 'affected with a public interest' can, in the nature of things, mean no more than an industry, for adequate reason, is subject to control for the public good."

Nebbia v. New York, 291 U. S. 502, 536, 78 L. Ed. 940, 956.

In *Munn v. Illinois, supra,* the court held that when private property is devoted to public use, it is subject to public regulation.

Where a restriction of the use of highways is designed to promote public convenience and the interest of all, it cannot be disregarded by the attempted exercise of some civil right, which in other circumstances would be entitled to protection under the Constitution.

> *Cox v. New Hampshire* (1940), 312 U. S. 569, 85 L. Ed. 1049, 1052.

Streets and sidewalks of a city are designated primarily for *travel* and for the transportation of goods to and fro thereon.

> *People v. Amdur* (1954), 123 Cal. App. 2d 951, 959, and cases therein cited.

The *Amdur* case, *supra,* was reversed on a claim of unconstitutional application, but the ordinance itself was upheld.

Prohibiting the use of the public streets and sidewalks for the conduct of private business has been upheld many times as a reasonable exercise of the police power, against claims of interference with interstate commerce, property rights, contract rights and fundamental individual liberties.

> *California v. Thompson,* 313 U. S. 109, 85 L. Ed. 1219;
>
> *Pittsford v. City of Los Angeles,* 50 Cal. App. 2d 25;
>
> *In re Mares,* 75 Cal. App. 2d 798;
>
> *People v. Galena,* 24 Cal. App. 2d Supp. 770.

F. The Ordinance Is Based Upon a Reasonable Classification.

The determination of a class based upon size, number of units, volume or capacity has frequently been upheld:

Grigsby v. King, 202 Cal. 299, 306 (area employing 8 or more teachers to form a school district);

Gillum v. Johnson, 7 Cal. App. 2d 747 (classification based upon employer of 8 or more persons);

New York ex rel. Bryant v. Zimmerman, 278 U. S. 63 (classification based on membership in secret organization having over 20 members).

G. The Ordinance Does Not Impair the Obligation of Contract in Manner Prohibited by Article I, Section 10, United States Constitution.

Every species of private right or interest is subject to regulation under the police power, including those that are specifically underwritten by constitutional guaranty.

11 Cal. Jur. 2d 553;

Sutter etc. Co. v. R.R. Commission, 202 Cal. 179.

"The constitutional principle of inviolability of contracts is subject to the one great qualification that contractual rights, like all other forms of property, are held subject to the exercise of the police power."

11 Cal. Jur. 2d 677;

DeHaviland v. Warner Bros. Pictures, Inc., 67 Cal. App. 2d 225.

It is also noteworthy that the Supreme Court of the State of California denied appellant's petition for a hearing. As was declared in *Stembridge v. State of Georgia,* 343 U. S. 541, 72 S. Ct. 834, 96 L. Ed. 1130, where the highest court of the state delivers no opinion and it ap-

pears the judgment might have rested upon a non-federal ground, this court will not take jurisdiction to review the judgment.

Appellee urges, therefore, that the appellant presents no substantial question for the decision of this court; that the order sought to be appealed from should be affirmed and/or the appeal dismissed.

Respectfully submitted,

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